

SOME REMARKS ON JUDICIAL SELF-RESTRAINT

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In February, 1960 a new municipal and county elections law was enacted in the Saarland, one of the member states of the Federal Republic of Germany. It established a system of proportional distribution of seats in the city, county and town councils among competing candidate's lists, but reserved to "political parties" in section 25, paragraph 2, the right to file candidate's lists. This, in effect, prevented non-partisan local citizens' groups from presenting their own tickets to the voters. A date for statewide municipal and county elections was set by the government for May 15, 1960. On April 2, a prospective candidate of one of the excluded local citizens groups in the town of Merzig—who actually was a member of the CDU, a political party, but who apparently had been refused a place on its ticket—filed a complaint with the Federal Constitutional Court¹ on the ground that the statute violated his constitutional right of equal opportunity to enter an election as a candidate. He prayed that section 25, paragraph 2 of the statute be declared unconstitutional and asked further that the court by temporary injunction enjoin the authorities from holding the election pending the decision on the validity of the statute. On May 10 the court denied the petition to grant the injunction. The elections were held on May 15 as scheduled. On July 12 the court announced its decision declaring section 25, paragraph 2 unconstitutional and therefore, void *ab initio*.² For the new election which must be held, non-partisan citizens' group candidate's lists will be admitted (the Saarland Legislative Assembly having amended the statute accordingly).

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¹ The jurisdiction of the Federal Constitutional Court is very complex. For lack of space it cannot be adequately outlined in this article. For a survey the reader is referred to the author's article "Judicial Review in the Federal Republic of Germany," *Am. J. Comp. Law* 29-47 (1959); see also Taylor Cole, "The West German Federal Constitutional Court," 20 *J. Politics* 278 (1958); same author: "The Bundesverfassungsgericht 1956-1958: An American appraisal," *Jahrbuch des Öffentlichen Rechts N.F.* vol. 8, 29.

Abbreviations used in this article: *GG* = "Grundgesetz für die Bundesrepublik Deutschland," of May 23, 1949, is the Constitution of the Federal Republic of Germany. *BVerfGG* = "Gesetz über das Bundesverfassungsgericht" of March 12, 1951, as amended, is the statute governing the organization and procedure of the Federal Constitutional Court. *BVerfGE* = "Entscheidungen des Bundesverfassungsgerichts," are the Reports of the decisions of the Constitutional Court (up to September 1, 1960, 10 volumes published).

² Both decisions will be published in vol. 11 *BVerfGE*. A summary of the decision of May 10 on the injunction has been published in Nr. 15/16 of the *Juristenzeitung* (1960) on p. 488.

In which stage of these proceedings did the court—if at all—exercise “judicial self-restraint”? One thing is certain, the question of proper use of judicial self-restraint would not have arisen had the court had enough time to consider the case on its merits and to hand down its decision before the day scheduled for the elections. This being impossible for lack of time, would it not have been for the court to grant the temporary injunction and order the elections put off until a ruling on the merits had been handed down?

The Constitutional Court has been given power to declare state and federal statutes void on constitutional grounds. It also has power to grant a temporary injunction³ while a case is pending if this is necessary to avoid grave disadvantages, to prevent imminent use of force or for other specific urgent reasons. As evidence of this authority, the very first action the court took immediately after it was organized in September 1951 was to grant a temporary injunction delaying a referendum provided for by federal statute in the states of Baden, Württemberg-Baden and Württemberg-Hohenzollern on the question whether they should be integrated into one state (now Baden-Württemberg).⁴ The court had assumed its duties on September 8—the Justices having taken their oath the day before—and the referendum had been set for September 16. The constitutionality of the statute governing the referendum proceedings had been heatedly disputed for months by large sections of the population concerned. This fact might well have influenced the result of the referendum had it been held before the court had ruled on the constitutionality of the statute. On the other hand, when in 1958 the federal government brought suit against statutes enacted in the states of Hamburg and Bremen providing for a statewide referendum on atomic rearmament⁵, the court enjoined the state authorities from holding the referendum pending a ruling on the validity of the statutes.⁶ Although the referendum was not intended to have legal consequences but only to inform the state governments concerned on public opinion, the results could have been used to put pressure on the federal government which had sole responsibility for foreign affairs and defense. Therefore, a court ruling declaring the statutes unconstitutional after the referendum had been held would have made no sense; the adverse effects of an unconstitutional referendum would not have been redressed.

In a similar way the court has granted a temporary injunction in

³ Sec. 32, para. 1 BVerfGG.

⁴ BVerfGE 1, 1; see also Von Mehren, “Constitutionalism in Germany,” 1 Am. J. Comp. Law 70 (1952); Leibholz, “The Federal Constitutional Court in Germany and the South-Western Case,” 46 Am. Pol. Sc. Rev. 723 (1952).

⁵ Rupp, *op. cit. supra* note 1 at 35.

⁶ BVerfGE 7, 367.

extradition cases against enforcement of the extradition order of an appellate court.⁷ Article 16 GG, stipulates that no German may be extradited to a foreign country. It is obvious that a court ruling on petitioner's status as a German citizen would be purely academic after he has been transferred into the custody of a foreign country.

The rule applicable to all these cases is this: the court is the supreme and only guardian against unconstitutional behavior of the political departments of government. It has the power to strike down unconstitutional laws and also to declare executive acts unconstitutional. But the political departments are the principal actors on the governmental stage and the court has only a referee-like function. For these reasons it should not unnecessarily interfere with the conduct of government. Such interference is most strongly felt when the court, by temporary injunction, orders the executive department to cease and desist from exercising some of its functions until their constitutionality has been established, or when it counteracts legislative endeavour by declaring a statute unenforceable pending a decision on its validity. Thus, the court has repeatedly said that it would make use of its power to issue a temporary injunction only with utmost restraint ("*nur mit grösster Zurückhaltung*")⁸; which is comparable to Mr. Justice Stone's famous statement in his dissent in *United States v. Butler*⁹ that the Supreme Court's own sense of self-restraint was the only—but necessary—check upon the exercise of judicial power.

Coming back to the Saarland election case, we can now give an answer to our question: the Federal Constitutional Court exercised self-restraint in dismissing the application for a temporary injunction. Such interference with the proper functions of the political departments of government could be dispensed with as it was entirely possible to repeat the election since the additional financial outlay for this undertaking was not sufficient grounds for stopping the wheels of government by court action.¹⁰

⁷ BVerfGE 6, 443.

⁸ E.g., BVerfGE 3, 52, 55. The same line had been followed earlier during the Weimar Republic by the "Staatsgerichtshof für das Deutsche Reich." See Lammers-Simons, "Die Rechtsprechung des Staatsgerichtshofs," vol. IV, 55,99, reporting a case in 1930: The Reich Government had for some years given the states financial subsidies for their police force. In 1930, the state of Thüringen had formed a government in which a prominent member of the Nazi party held the post of Minister of the Interior. After he had appointed fellow nazis to key positions in the police administration, the Reich Government stopped payments. Thüringen brought suit against the Reich and asked the "Staatsgerichtshof" to order the Reich by temporary injunction to continue the payments pending the decision on its obligation to pay. The court said, that it would use the device of a temporary injunction "*nur mit grösster Zurückhaltung*" and therefore denied the application.

⁹ 297 U.S. 1, 79 (1935).

¹⁰ This line of reasoning used by the court has been criticized, however, on the

STATUTORY AND COURT IMPOSED RESTRAINTS

Although the Federal Constitutional Court has used the term "*mit grösster Zurückhaltung*" (with utmost restraint) thus far mainly in connection with applications for a temporary injunction, it actually has shown judicial self-restraint in many other instances.

Some features of judicial restraint do not depend entirely upon the discretion of the court but are imposed on it by statute. They are mentioned here because they are manifestations of the same principles.

As has already been said, there are two main areas of jurisdiction allotted to the Constitutional Court; the power to declare federal and state statutes unconstitutional on different procedural avenues,¹¹ and the power to adjudicate disputes between the federal executive and legislative departments and between the federal government and a state government on their constitutional powers.¹²

The *Gesetz über das Bundesverfassungsgericht* which lays down the rules of procedure for the court, restrains it to a ruling in a mere declaratory form. In case of a dispute between the political departments or between the federal government and a state, the court's ruling will only state that the specific course of action or measure (*Massnahme*) taken by the defendant does or does not violate article Y of the GG.¹³ While the court may not order the defendant to reverse its action, the defendant is under a legal obligation to comply with the *ruling* which is binding on all agencies of the Federation and the states.¹⁴ The same rule applies in a case concerning the validity of a statute. The court will either declare that the statute is void or that it is consonant with the GG.¹⁵ The difference in the legal effect of a ruling granting a temporary injunction is obvious.

ground that an election, even if it has been held under a statute later declared unconstitutional, nevertheless is a historical fact which will influence the outcome of a second election held, thereafter, if only by keeping away disappointed and tired voters from the ballot box. See note by *Arndt* in *Juristenzeitung* 1960, 488. In a similar case concerning the municipal elections law of the state of Niedersachsen, the court, however, on October 6, 1960 granted a temporary injunction putting off the election pending a ruling on the constitutionality of the statute. This order, however, is not inconsistent with the course taken by the court in the *Saarland* case, because it appeared from the record that the Niedersachsen law was clearly unconstitutional. Since the court did not have the time to say that in a written opinion before election day, it preferred granting a temporary injunction and giving a ruling on the merits later.

¹¹ Rupp, *op. cit. supra* note 1 at 31.

¹² *Id.*, at 42; Rupp, "A Supreme Court in Germany?," 5 *Harvard Law School Bulletin* 10 (1954).

¹³ § 67, 69 BVerfGG; BVerfGE 1, 352 (dispute between Bundestag and Federal Government), BVerfGE 11,1 (dispute between State of Nordrhein-Westfalen and Federal Government).

¹⁴ § 31, para. 1 BVerfGG.

¹⁵ § 78, 82 para. 1, 95 para. 3 BVerfGG; BVerfGE 8, 51.

The idea behind the statutory provisions limiting the court to a declaratory judgment is that the authority of the court is greatly enhanced by limiting its function to simply stating what the law is in the actual controversy and remaining aloof from enforcing the ruling itself. The only marshal there is to enforce the court's ruling is its moral authority, the conscience of the parties concerned and, in the last resort, the people's respect for law and good government. It is mainly this limitation which renders it less objectionable to let a court settle legal issues which are closely connected with domestic or international politics.

To keep itself within the proper bounds of judicial power, the Federal Constitutional Court has also developed some rules which are similar to the "Ashwander-rules" as stated by Mr. Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*.¹⁶

1. "The Court will not pass upon the constitutionality of legislation in a friendly, non adversary proceeding. . . ." On the assumption that the proper judicial function is to decide actual controversies and not to tender legal advice on moot questions, the constitution has given the court power¹⁷ to decide "on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal organ or of other parties concerned who have been endowed with independent rights by this Basic Law or by rules of procedure of a supreme federal organ."¹⁸ The court has always construed this as meaning that an actual controversy on constitutional rights and powers must exist among the contenders.¹⁹ As an example, the court dismissed a case brought in 1953 by the caucuses of three parties in the Bundestag representing the government's majority against the SPD-party caucus after the second reading of the bill concerning the adoption of the European Defense Community Treaty, attempting to get a ruling on the constitutionality of the treaty.²⁰ The majority contended that the defendant minority had violated the constitution in denying to the Bundestag and to the majority the right to pass the bill by a simple majority (the SPD had maintained throughout the debate that the bill could only be passed after the constitution had

¹⁶ 297 U.S. 238, 345-348 (1936).

¹⁷ Art. 93 para. 1. no. 1 GG; Rupp, *op. cit. supra* note 1 at 42.

¹⁸ Cases of that type: BVerfGE 1, 351, 372; 2, 347 (SPD party caucus on behalf of Bundestag against federal government on the question of whether the latter had violated the right of the Bundestag to give or withhold consent to an international treaty according to art. 59 GG by not introducing the treaty in the Bundestag).

¹⁹ BVerfGE 2, 143, 155, 159; 2, 347, 366.

²⁰ Earlier, in 1952, a similar request submitted by the SPD to the First Senate of the Court was dismissed for want of jurisdiction. See BVerfGE 1, 396; Rupp, *op. cit. supra* note 12.

been amended by a two-thirds majority in the Bundestag and Bundesrat). The court said that although a political controversy undoubtedly existed among the parties, there was no dispute concerning their rights and duties under the constitution. The court reasoned that merely to vote against a bill could not violate anybody's constitutional rights but on the contrary, was the proper exercise of a constitutional right which every member of the legislature had.²¹

The existence of an actual controversy on constitutional powers and duties is also required for suits brought by the federal government against a state—or vice versa—or by a state against another state.²² This requirement is stressed by the wording of the relevant rule of procedure²³ which states that plaintiff has to establish to the satisfaction of the court that his rights have been violated by a specific act or omission of the defendant.

The question whether a federal or state statute is constitutional can arise by way of reference from a civil, criminal or administrative court, by way of a request from the federal government, a state government or one third of the Bundestag, or by way of a constitutional complaint filed by a private individual.²⁴ In the first case there is an actual controversy pending before the court below which refers the constitutional question to the Constitutional Court. In the second case the constitution requires that "differences of opinion or doubts exist on the formal and material compatibility of the statute with the Constitution."²⁵ This excludes moot questions. In the third case, petitioner must establish that his constitutional rights are impaired directly by the operation of the statute.²⁶

2. "The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." The same rule has been followed by the Federal Constitutional Court. One of the more recent examples is furnished by a case decided this year between the State

²¹ BVerfGE 2, 143, 168.

²² Art. 93 para. 1 nos. 3 and 4 GG. Cases of that type: BVerfGE 6, 309 (Federal Government against State of Niedersachsen, so called *Konkordat* case. It concerned the question whether Niedersachsen by enacting a statute on public schools had violated the *Konkordat*, a treaty concluded in 1933 between the Reich and the Holy See, and whether the state thereby impaired the right of the Federation to have the states respect its international treaty obligations when enacting legislation). Another case is found in BVerfGE 11, 1: State of Nordrhein-Westfalen against federal government on the question whether the latter had violated the former's right to execute federal law as a matter of its own concern by licensing steam boilers manufactured by firms in Nordrhein-Westfalen. See also *infra* 2 (ii) at note 27.

²³ § 64, 69, 71 BVerfGG.

²⁴ Rupp, *op. cit. supra* note 1 at 32-35.

²⁵ Art. 93 para. 1 no. 2 GG, § 76 BVerfGG.

²⁶ § 91 BVerfGG.

of Nordrhein-Westfalen and the federal government.²⁷ It involved interpretation of a pivotal principle of our federal structure laid down in articles 30 and 83 GG, which states that the exercise of governmental powers and the discharge of governmental functions is incumbent on the states and that they execute federal laws as matters of their own concern insofar as the constitution does not otherwise provide or permit. Thus, except in such fields as the foreign service, defense, federal finance administration, postal service, federal waterways, and federal railroads, the mandates of the national government are enforced solely by the states which alone have a complete apparatus of law enforcement, both executive and judicial, at their disposal.²⁸ In the case mentioned, a federal statute required that steam boilers be examined and licensed for the protection of employees before being placed in use. Upon application of several manufacturers of boilers in Nordrhein-Westfalen, the Federal Minister of Labor had granted general licenses for certain types of boilers. The state government of Nordrhein-Westfalen maintained that enforcement of the federal statute was within the exclusive jurisdiction of the state and that only the State Minister of Labor had the power to grant such a license. The federal government argued that articles 30 and 83 of the constitution by implication permitted that under certain conditions a Federal Minister could take the necessary steps to enforce a federal statute even if it did not cover the foreign service, defense, federal waterways, etc., in order to guarantee uniform enforcement throughout the Federation. Since the question whether so called supra-regional administrative acts (*überregionale Verwaltungsakte*) could be issued by the federal government had for some time been under discussion between the Federal Council (Bundesrat) representing the states and the federal government, everyone had hoped that the court would now lay down the conditions under which the federal government was entitled to enforce a statute by a supra-regional administrative act. However, the court felt that to do this would mean deciding more than the case at bar was calling for and that the question, if put in such general terms, was not yet ripe for adjudication. Therefore, it restricted its ruling to the statement that in the case at bar the federal government had violated the rights of the State of Nordrhein-Westfalen because there was no sufficient ground for the federal action.

3. "The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Although the case mentioned in the foregoing paragraph could also serve as an illustration for this rule, it is primarily used in cases

²⁷ BVerfGE 11, 1; *supra* note 22.

²⁸ Rupp, *op. cit. supra* note 1 at 30.

in which the question of the validity of a statute is referred to the Federal Constitutional Court by a lower court. The court does not entertain the case on an appeal but must ascertain whether determination of the case in the court below necessarily depends upon a ruling on the constitutional issue.²⁹

4. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." This rule is to some extent related to what the court does in the cases mentioned in the preceding paragraph; if it finds that the statute is not the sole basis for determination of the case by the court below, it will dismiss the request. As to other cases coming within the jurisdiction of the court, the rule does not apply because it is not an appellate court, but has jurisdiction only over cases involving a clear constitutional issue.

5. "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." The Federal Constitutional Court has developed the rule that a constitutional complaint by an individual against a statute will only be entertained if the petitioner can establish that he has been directly injured by the operation of the statute.³⁰

6. If somebody has availed himself of the benefits of a statute he will probably not be able to maintain that at the same time he has been injured by it. At any rate, this case has not as yet materialized in the jurisdiction of the Constitutional Court.

7. "When the validity of an Act of Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." This is also a cardinal principle in the jurisdiction exercised by the Constitutional Court. There is always a presumption that a statute is consonant with the constitution. (*Verfassungskonforme Auslegung*).³¹

LIMITATIONS ON THE COURT'S POWER TO "CHOOSE" IT'S CASES

The Federal Constitutional Court unfortunately lacks one extremely efficient device of self-restraint which the United States Supreme Court has at its disposal: it has no certiorari power. The scope of its jurisdiction has been elaborately laid down by the constitution and the *Gesetz über das Bundesverfassungsgericht*, and the court must take all cases coming under one of these headings. When it became ap-

²⁹ For the details of this procedure see Rupp, *op. cit. supra* note 1 at 33; BVerfGE 2, 181, 190; 2, 237; 3, 187, 195.

³⁰ BVerfGE 1, 97.

³¹ BVerfGE 2, 266, 282; 4, 7; 4, 157; 7, 267, 273; 7, 305, 319; 8, 28, 34; 9, 197, 200; 9, 284.

parent that the number of constitutional complaints filed by individual petitioners was ever increasing and that the court would soon develop a considerable backlog, it asked the federal government and the federal legislature to amend the *Gesetz über das Bundesverfassungsgericht* to give the court the power of certiorari to accept or reject constitutional complaints. However, the only relief the legislature was willing to provide was to establish a committee of three Justices (out of ten in each Senate)³² with the power to dismiss complaints provided the committee unanimously agreed that a decision on the merits would not resolve any question of constitutional law, and that the petitioner would not suffer a grave loss if no decision on the merits was handed down. If the three Justices cannot agree to dismiss the case it must go to the full Senate. This device of "limited certiorari" has helped to a certain degree to eliminate obviously inadmissible or unfounded constitutional complaints, but this procedure cannot be used to evade issues which the court, for some reason, would rather leave unsettled. Thus the court cannot restrain itself by merely locking the door.

The judicial settlement of issues involving constitutional law always has political implications since these decisions affect the political departments of government or federal-state relations. Nevertheless, as long as a legal rule exists for the guidance of the court it cannot avoid settling questions by judicial decision even if the legal question is politically "hot."³³ The court, of course, must not interfere with politics and is not allowed to question the wisdom of a statute or of an executive act; its function is limited to deciding the legal questions which are preliminary to the exercise of the political functions of the other departments of government.³⁴

There are—quite naturally—questions, the final determination of which the constitution has entrusted to the political departments of government. These might justly be called "political" questions.

In the first place there should be mentioned the cases of legislative discretion. In matters within the concurrent legislative power of the Federation and the states, the federal legislature has the power to enact statutes "if a need for federal legislation exists because a matter cannot be effectively dealt with by state legislation or because the maintenance of legal or economic unity necessitates it."³⁵

The court has construed this clause as leaving entirely to the federal legislature the question whether a need for federal legislation

³² § 91(a) BVerfGG.

³³ Rupp, *op. cit. supra* note 1 at 44.

³⁴ See BVerfGE 2, 79, 96.

³⁵ Art. 72 para. 2 nos. 1 and 3 GG.

exists;³⁶ the court will only examine a claim of arbitrary exercise of discretion by the Legislature.

A similar problem arose with regard to article 135 GG, settling the succession of the property of those German states which had ceased to exist after the war, such as Prussia. Article 135, paragraphs 1 to 3 laid down certain rules to be followed, and paragraph 4 provided that a different settlement could be effected by federal statute "if an overriding interest of the Federation so requires." When the court had to pass on the constitutionality of a federal statute which established a foundation to take care of the art treasures of the former State of Prussia it expressly refrained from going into the question of whether an overriding interest of the Federation made the enactment necessary.³⁷

Another example of legislative discretion can be found in constitutional clauses which give some directives for the settlement of a certain matter, but leave the details to the legislature. Article 120 GG, states that the Federation shall bear the expenditure for occupation costs and the other internal and external charges caused as a consequence of the war "as provided for in detail by a federal statute." The court held that while this statute could not shift the burden from the Federation to the states because the constitution clearly prohibited this, in every other respect the legislature was entirely free to regulate the details.³⁸

The most important area of legislative discretion lies within the scope of article 3, paragraph 1 GG, which establishes the principle that all persons are equal before the law. The Federal Constitutional Court has developed the rule that article 3, paragraph 1 GG, was intended to prevent arbitrary action of the legislature. It prohibits arbitrary unequal treatment of equals. Within these borders the legislature may exercise its own discretion and may even differentiate among equals. Its discretion ends where the unequal treatment of equals obviously cannot be justified by convincing reasons. The Federal Constitutional Court can only examine whether the legislature has repudiated these limitations of its discretion; that is, whether it has acted arbitrarily.³⁹

The scope of legislative discretion has been narrowed by the court in regard to equal treatment of voters and political parties in election laws. This is premised on the right of the citizen to an equal vote and of a candidate or a party to an equal chance in an election. In

³⁶ BVerfGE 1, 264, 272; 2, 213, 224; 4, 115, 137.

³⁷ BVerfGE 10, 20, 40.

³⁸ BVerfGE 9, 313, 330.

³⁹ BVerfGE 1, 14, 52; 3, 58, 135; 4, 219, 243; 4, 352, 357; 9, 20, 28; 9, 201, 206; 9, 334, 337.

the light of German constitutional history and with regard to the democratic and egalitarian foundations of the constitution, these rights call for a stricter and more literal application of the principle of equality.⁴⁰

The Federal Constitutional Court cannot issue a writ of mandamus to the legislature⁴¹ compelling them to pass a certain statute, although to declare unconstitutional a law which is already on the statute books may in some instances produce the effects of a mandamus. Take for example our Saarland municipal elections case. Section 25 of the statute has been declared unconstitutional. Because there must be an election, a statute governing the election was needed; consequently the State Assembly was forced to pass a new statute consonant with the ruling of the court.⁴²

Occasions also arise when the legislature violates the constitution by either inaction or incomplete action. For example, a federal statute had increased salaries and pensions for civil servants in order to compensate for the rising cost of living, but had left out one category regarding retired officials. The court held that article 33, paragraph 5 GG, which required that public service should be governed by the traditional principles of the permanent civil service, was violated. This provision, the court said, made it imperative that the legislature provide equally for all categories of the civil service. But the incomplete statute was not declared void; the court merely declared that the legislature had, by this omission, violated the constitutional rights guaranteed in article 33, paragraph 5 GG to the neglected group to which petitioners belonged.⁴³

If the Federal Constitutional Court is called upon to decide whether a statute is constitutional, it examines not only whether the provisions of the statute in their contents are consonant with the constitution, but also whether the legislature in passing the statute has observed the procedure required by the constitution. Thus, the court must look into the question of whether the Federal Council's (*Bundesrat*—the Upper House of the Federal Legislature) consent has been secured. This is necessary for statutes which touch upon states' rights.⁴⁴ Thus *Field v. Clark*⁴⁵ and *Coleman v. Miller*⁴⁶ might

⁴⁰ BVerfGE 1, 208, 247; 6, 84, 91.

⁴¹ BVerfGE 1, 97.

⁴² But see for a different line of argument *Colegrove v. Green*, 328 U.S. 549, 553 (1945).

⁴³ BVerfGE 8, 1, 20.

⁴⁴ Art. 93 para. 1 no. 2 GG: formal and material compatibility ("förmliche und sachliche Vereinbarkeit").

⁴⁵ 143 U.S. 649 (1892).

⁴⁶ 307 U.S. 433 (1939).

possibly have been decided otherwise had similar facts been presented to the German Federal Constitutional Court.

The Federal Constitutional Court also examines the rules of the legislature governing legislative procedure on their compatibility with the constitution. It has declared void a section of the Bundestag's rules which stated that bills involving additional financial outlay exceeding the appropriation in the annual budget will not be debated unless accompanied by a proposal on how the costs should be met; the court held that this rule put an undue restraint on the right of the deputies to introduce bills.⁴⁷

A suit on behalf of the Federation may be brought only by the federal government, not by a single Federal Minister. Therefore, a Cabinet resolution is required to institute proceedings. The court has to ascertain whether such a resolution was actually passed and, in case of doubt, may ask the government for the minutes of the Cabinet meeting in question. But it will not go behind the minutes; it will accept those as sufficient proof that a Cabinet resolution was passed.⁴⁸

The question of how far judicial self-restraint should go has also been raised with regard to so-called treaty laws (*Vertragsgesetze*). Article 59, paragraph 2 GG provides that treaties which regulate the political relations of the Federation or relate to matters of federal legislation require the consent, in the form of a statute, of the federal legislative bodies. The statute empowers the Federal President to ratify the treaty and, together with the publication of the text of the treaty in the Official Gazette (*Bundesgesetzblatt*) also transforms the provisions of the treaty into domestic law.⁴⁹ The federal government, in a case concerning the validity of the statute on the so-called Saar-Agreement concluded between France and the Federal Republic on October 23, 1954, had argued that the statute giving the consent of the legislative bodies to an international treaty actually was an "*acte de gouvernement*" (an act of foreign policy in the form of a statute), and that therefore the determination of its validity—and of the validity of the treaty provisions as well—was outside the scope of the judicial function. But the court did not accept this reasoning; it maintained that it had the power to determine whether the statute and the provisions of the treaty were consonant with the constitution because a statute was a statute without regard to whether it settled a purely domestic matter or whether it transformed the clauses of an international treaty into domestic law.⁵⁰

⁴⁷ BVerfGE 1, 144.

⁴⁸ BVerfGE 6, 309, 324.

⁴⁹ BVerfGE 1, 396, 411.

⁵⁰ BVerfGE 4, 157, 161, 162.

CONCLUSION

In *United States v. Lovett*,⁵¹ Mr. Justice Frankfurter stated in his concurring opinion that particularly when Congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. In his opinion, the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them if at all possible. The Federal Constitutional Court cannot apply this maxim to all cases coming before it, mainly, as has been explained earlier, for procedural reasons. But in its general attitude, it exercises self-restraint whenever it deems it proper. On the other hand, a constitutional court must be aware that almost all issues it is called upon to decide have some political coloring and, in a broader sense, concern "political questions." One of the purposes the Federal Constitutional Court is called upon to serve is to insure that the business of government is conducted with due respect for the law. If it shrinks from this responsibility because a case is politically "hot", it will pass up many opportunities to demonstrate to the political departments of government, and the people that ours is a government of law.

⁵¹ 328 U.S. 303, 319, 320 (1945).